

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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|-----------------------------------|---|--|
|                                   | * | Chapter 11                               |
| In re                             | * | Case No. 01-01139 (JKF)                  |
|                                   | * | Jointly Administered                     |
| W.R. GRACE & CO., <i>et al.</i> , | * |  |
|                                   | * | Hearing Date: May 24, 2004 at 12:00 p.m. |
| Debtor.                           | * | Related Docket No. 5424                  |
| *****                             |   |  |

**LIBBY CLAIMANTS' SUPPLEMENT TO MOTION FOR  
RELIEF FROM AUTOMATIC STAY AND PRELIMINARY  
INJUNCTION TO TAKE PERPETUATION DEPOSITIONS<sup>1</sup>**

Claimants injured by exposure to tremolite asbestos from the Debtors' operations in and near Libby, Montana<sup>2</sup> (the "Libby Claimants"), by and through their counsel, McGarvey, Heberling, Sullivan & McGarvey, P.C.; Cohn Khoury Madoff & Whitesell LLP; and Landis Rath & Cobb LLP, hereby supplement the Libby Claimants' Motion for Relief From Automatic Stay and Preliminary Injunction to Take Perpetuation Depositions dated April 8, 2004 (the "Motion") [Docket No. 5424] to: (a) add Libby Claimant Harold Wilburn to the list of Proposed Deponents<sup>3</sup>, and (b) include the perpetuation deposition of Ruben Fellenberg that was taken on January 2, 2003 for consideration for retroactive relief with the December Perpetuation Depositions. In support of this Supplement, the Libby Claimants state:

1. The Libby Claimants had anticipated that the Motion would be resolved quickly, but six weeks have past since the Motion was filed. During this period of time, the perpetuation deposition of Libby Claimant Harold Wilburn has become critical. Mr. Wilburn is currently on

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<sup>1</sup> An identical pleading is being filed contemporaneously in Adversary Proceeding No. A-01-771 because relief is being sought from the Preliminary Injunction (as defined in the Motion) as well as from the automatic stay.

<sup>2</sup> As identified in the Verified Statement of Cohn Khoury Madoff & Whitesell LLP and Landis Rath & Cobb LLP Pursuant to Fed. R. Bankr. P. 2019 [Docket No. 4807] filed in Case No. 01-01139 (JFK), as it may be amended and supplemented from time to time.

<sup>3</sup> All capitalized terms shall have the definition provided to them in the Motion unless otherwise defined herein.

oxygen 24 hours per day, can only walk 10 feet, suffers from severe asbestos disease including cor pulmonale, has significant risk of death at any time, and is not expected to live even one year. Accordingly, the Libby Claimants supplement the Motion to add Harold Wilburn to the list of Proposed Deponents for which the Libby Claimants seek relief from the automatic stay and Preliminary Injunction to proceed with perpetuation depositions.

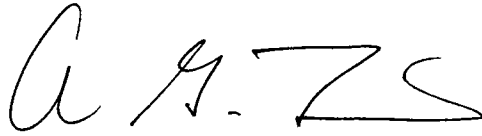
2. On January 2, 2003, the perpetuation deposition of Ruben Fellenberg was taken pursuant to an order from the Montana Workers' Compensation Court (the "Fellenberg Perpetuation Deposition"). Prior to the Fellenberg Perpetuation Deposition, on December 20, 2002, the Debtors' insurer, Transportation Insurance Co., provided notice of the deposition to the Libby Claimants. Counsel to Transportation Insurance Co. appeared and conducted an examination of Mr. Fellenberg. On October 15, 2003, Jon L. Heberling, counsel to the Libby Claimants, sent a letter to Janet S. Baer, counsel to the Debtors, which enclosed a copy of the transcript of the Fellenberg Perpetuation Deposition (a copy of the letter is attached hereto as Exhibit A). In his letter, Mr. Heberling explicitly stated that the Libby Claimants' position "for the Proof of Claim will be that the occupational disease deposition is sufficient." See Exhibit A. The letter further states that "[i]f the [Debtors] do not agree with this position, please let me know. If you wish to take [Mr. Fellenberg's] deposition for the bankruptcy proceedings, we will make arrangements." Id. The Libby Claimants received no response from the Debtors to the October 15, 2003 letter. Accordingly, the Libby Claimants supplement the Motion to include the Fellenberg Perpetuation Deposition for consideration of retroactive relief with the December Perpetuation Depositions.

**Conclusion**

3. For the forgoing reasons, the Libby Claimants respectfully request that this Court grant the Motion, as modified by this Supplement, and enter the proposed form of order attached to the Libby Claimants' Response to Objections to Motion for Relief From Automatic Stay and Preliminary Injunction to Take Perpetuation Depositions, which is being filed contemporaneously herewith.

Dated: May 14, 2004

LANDIS RATH & COBB LLP



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Counsel to Libby Claimants

## **Exhibit A**

(Letter from Jon L. Heberling to Janet S. Baer dated October 15, 2003)

**McGarvey, Heberling, Sullivan & McGarvey, P.C.**

*Date L. McGarvey  
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**October 15, 2003**

*Emails: dmcgarvey@mcgarveylaw.com  
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rsullivan@mcgarveylaw.com  
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**COPY**

Janet S. Baer  
Kirkland & Ellis  
W.R. Grace Counsel  
200 East Randolph Drive  
Chicago IL 60601

Re: Ruben Fellenberg

Dear Janet:

Ruben Fellenberg worked at W.R. Grace from 1958 to 1986. He is on oxygen. His deposition in his occupational disease case preserves his testimony. Enclosed is a copy. Our position for the Proof of Claim will be that the occupational disease deposition is sufficient. If you do not agree with this position, please let us know. If you wish to take his deposition for the bankruptcy proceedings, we will make arrangements.

Yours sincerely,

**McGARVEY, HEBERLING, SULLIVAN  
& McGARVEY**

*Dictated But Not Read*

**JON L. HEBERLING**

JLH:mgh  
Enclosure